CORRECTED COPY.

MOTION FILED
JAN 9 1980

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-66

PETER E. AARON,
Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION OF SECURITIES INDUSTRY ASSOCIATION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

and

BRIEF *AMICUS CURIAE* OF SECURITIES INDUSTRY ASSOCIATION

MILTON V. FREEMAN
WERNER KRONSTEIN
Attorneys for *Amicus Curiae*,
Securities Industry
Association
1229 Nineteenth Street, N.W.
Washington, D.C. 20036

Of Counsel

ARNOLD & PORTER
1229 Nineteenth Street, N.W.
Washington, D.C. 20036
RICHARD O. SCRIBNER
EDMUND P. BERGAN, JR.
20 Broad Street
New York, New York 10005

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-66

PETER E. AARON,
Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

MOTION OF SECURITIES INDUSTRY ASSOCIATION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

The Securities Industries Association (the "SIA") hereby respectfully moves, pursuant to Rule 42 of the Rules of this Court, for leave to file the attached brief *amicus curiae* in order to present its views as to the standards properly governing the issuance of an injunction against violations of Section 17(a) of the Securities Act of 1933, 15 U.S.C. § 77q(a), Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b)(1976) ("Section 10(b)"), and Securities and Exchange Commission Rule 10b-5, 17 C.F.R. § 240.10b-5 (1979) ("Rule 10b-5"). The SIA submits that the Court of Appeals for the

Second Circuit erred in its formulation and application of these standards and contends the judgment of that Court should be reversed and the cause remanded for further proceedings.

The SIA is a national trade association representing approximately 500 brokers and dealers responsible for over 90 percent of the securities brokerage and investment banking business of the nation. Its membership is a cross-section of the diverse facets of the securities business and encompasses members of national securities exchanges as well as firms which are not members of such exchanges. The firms which comprise the SIA's membership are located across the nation and provide services to investors of every description. Almost all of SIA's members are registered as broker-dealers with the Securities and Exchange Commission ("SEC"). SIA is generally regarded as a principal spokesman for the securities industry before legislative, regulatory and judicial bodies.

Broker-dealers are at the very heart of the business regulated by the SEC pursuant to the Securities Act of 1933 and the Securities Exchange Act of 1934. The antifraud provisions of Section 17(a) and Rule 10b-5 are frequently the basis for SEC injunction actions against broker-dealers. This case presents an issue which is of prime importance to broker-dealers—i.e., whether an injunction based upon the antifraud provisions can be obtained by the SEC on a showing of negligence alone—without any proof of scienter.

If the antifraud provisions were held to include, for purposes of SEC injunction actions negligent as well as intentional and reckless conduct, there surely would be a substantial increase in the number of SEC injunction actions under the antifraud provisions instituted against

broker-dealers and a corresponding increase of the number of broker-dealers who would become subject to such injunctions, either by way of a settlement of such cases or after a litigation on the merits. The mere institution of fraud charges against the broker-dealer inevitably result in very serious consequences for its business, which are magnified by the actual issuance of an antifraud injunction. Moreover, the entry of an injunction against a broker-dealer subjects the broker-dealer to the imposition of serious administrative disciplinary sanctions under 15(b) of the 1934 Act. The unique interest of the SIA therefore in the outcome of this litigation is obvious.

The SIA determined to submit to this Court a brief *amicus curiae* only after having a chance to review the Petitioners Brief and the Brief *amicus curiae* filed by the American Institute of Certified Public Accountants ("AICPA"). A review of these briefs indicated to the SIA that considerations believed to be important to this Court's decision of this case were not discussed in either brief. Accordingly, the attached Brief *Amicus Curiae* focuses on the issues and authorities not covered in the other briefs.

More specifically, the issues covered in the SIA Brief, and not covered elsewhere, include (1) important-considerations relating to the applicability of the scienter requirement to Section 17(a), including an analysis of the legislative history and the overall structure of the 1933 and 1934 Acts; (2) the legislative history of Section 21(d) of the 1934 Act, 15 U.S.C. § 78u(d), which was relied upon by the Second Circuit below; (3) the interrelationships between injunctions and administrative disciplinary sanctions on broker-dealers under Section 15(b) of the 1934 Act, 15 U.S.C. §78o(b), (4) the established equitable principles governing the availability of injunctive relief; (5) the prerequisites for injunctive relief under Section 20(b) of the 1933 Act, 15 U.S.C. § 77t(b) (1976), and

Section 21(d) of the 1934 Act; and (6) the requirement that injunctions be specific in their commands as required by Rule 65(d) of the Federal Rules of Civil Procedure.

Where our views are substantially similar to those of the AICPA, reference is made to the AICPA Brief to avoid duplication.

Respectfully submitted,

MILTON V. FREEMAN
WERNER KRONSTEIN
Attorneys for *Amicus Curiae*,
Securities Industry
Association
1229 Nineteenth Street, N.W.
Washington, D.C. 20036

Of Counsel
ARNOLD & PORTER
1229 Nineteenth Street, N.W.
Washington, D.C. 20036
RICHARD O. SCRIBNER
EDMUND P. BERGAN, JR.
20 Broad Street
New York, New York 10005

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-66

PETER E. AARON,
Petitioner,
v.
SECURITIES AND EXCHANGE COMMISSION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF *AMICUS CURIAE* OF SECURITIES INDUSTRY ASSOCIATION

MILTON V. FREEMAN
WERNER KRONSTEIN
Attorneys for *Amicus Curiae*,
Securities Industry
Association
1229 Nineteenth Street, N.W.
Washington, D.C. 20036

Of Counsel
ARNOLD & PORTER
1229 Nineteenth Street, N.W.
Washington, D.C. 20036
RICHARD O. SCRIBNER

TABLE OF CONTENTS

	Page
PRELIMINARY STATEMENT	1
OPINIONS BELOW	2
QUESTIONS PRESENTED	2
ADDITIONAL STATUTE INVOLVED	2
INTEREST OF THE SIA AS AMICUS CURIAE	4
STATEMENT	6
SUMMARY OF ARGUMENT	8
ARGUMENT	11
I. THE SEC IS NOT ENTITLED TO AN INJUNCTION RESTRAINING VIOLATIONS OF THE ANTIFRAUD PROVISIONS OF THE 1933 AND 1934 ACTS UPON PROOF OF NEGLIGENCE ALONE	11
A. Section 10(b) and Rule 10b-5 Require Proof of Scienter	11
B. Section 17(a) Also Requires Proof of Scienter	13
1. The Language of Section 17(a)	14
2. Legislative History of Section 17(a)	16
3. Structure of the 1933 and 1934 Acts	18
C. Section 21(d) of the 1934 Act and the Comparable Provisions of Section 20(b) of the 1933 Act Define and Limit the SEC's Injunctive Powers and Do Not Enlarge the Substantive Antifraud Provisions of the Act	22

Page

D. The Elimination of the Scienter Requirements in SEC Injunction Actions Under the Antifraud Provisions Would Circumvent the Specific Statutory Requirements of Section 15(b) of the 1934 Act 24

II. THE AVAILABILITY AND ISSUANCE OF INJUNCTIVE RELIEF IS GOVERNED BY ESTABLISHED EQUITABLE PRINCIPLES 27

A. The Potent Weapon of Injunctive Relief is Available Only Where There is a Need to Deter Future Unlawful Conduct and Where the Public Interest Outweighs Countervailing Private Needs 27

B. The Harmful Consequences of Subjecting Broker-Dealers and Other Persons to Injunction Actions Based on Negligence Alone Far Outweigh the Countervailing Public Interest Served By Such an Extension of the SEC's Injunctive Powers 29

1. Proliferation of SEC Injunction Actions 29

2. Increased SEC Leverage in Settlements of Enforcement Actions 30

3. Impact of Injunction 31

4. Collateral Administrative Consequences 31

C. No Valid Enforcement Purpose is Served By Issuing an Injunction on the Basis of Negligence Alone 32

Page

III. THIS COURT SHOULD INSTRUCT THE LOWER COURTS AS TO THE APPROPRIATE STANDARDS AND FORM OF INJUNCTIVE RELIEF 33

A. The Applicable Standards for Injunctive Relief under Section 20(b) of the 1933 Act and Section 21(d) of the 1934 Act 34

B. The Injunction Issued Here Does Not Comply with the Requirements of Specificity and Reasonable Detail under Rule 65(d) 37

CONCLUSION 41

TABLE OF AUTHORITIES

	Page
CASES:	
Ernst & Ernst v. *Hochfelder*, 425 U.S. 185 (1976)	8, *passim*
Hecht Co. v. *Bowles*, 321 U.S. 321 (1944)	10,27,28
International Longshoremen Association v. *Philadelphia Marine Trade Association*, 389 U.S. 64 (1967)	38
Malik v. *Universal Resources Corp.*, 425 F.Supp. 350 (S.D. Cal. 1976)	14
National Labor Relations Board v. *Express Publishing Co.*, 312 U.S. 426 (1941)	39
Pasadena City Board of Education v. *Spangler*, 427 U.S. 424 (1976)	38
Rondeau v. *Mosinee Paper Co.*, 422 U.S. 49 (1975)	27
Sanders v. *John Nuveen & Co., Inc.*, 554 F.2d 790 (7th Cir. 1977)	15
Schmidt v. *Lessard*, 414 U.S. 473 (1974)	38
SEC v. *E.L. Aaron & Co., Inc.*, Fed. Sec. L. Rep. (CCH) ¶ 96,043 (S.D.N.Y. 1977), *aff'd*, 605 F.2d 612 (2d Cir. 1979)	2, *passim*
SEC v. *Bausch & Lomb*, 565 F.2d 8 (2d Cir. 1977)	35
SEC v. *Capital Gains Bureau*, 375 U.S. 180 (1963)	40
SEC v. *Cenco, Inc.* 436 F. Supp. 193 (N.D. Ill. 1977)	31,35
SEC v. *Commonwealth Chemical Securities*, 574 F.2d 90 (2d Cir. 1978)	35
SEC v. *Coven*, 581 F.2d 1020 (2d Cir. 1978)	9,15,17 18,23
SEC v. *National Student Marketing*, 360 F. Supp. 284 (D.D.C. 1978)	35
SEC v. *Sloan*, 436 U.S. 103 (1978)	22
SEC v. *Wills*, Fed. Sec. L. Rep. (CCH) ¶ 96,712 (D.D.C. 1978)	35

	Page
Securities Investor Protection Corp. v. *Barbour*, 421 U.S. 412 (1975)	30
Steadman v. *SEC*, 603 F.2d 1126 (5th Cir. 1979)	14,15
Touche Ross & Co. v. *Redington*, 99 S. Ct. 2479 (1979)	12,20
United States v. *Custer Channel Wing Corp.*, 376 F.2d 675 (4th Cir.), *cert. denied*, 389 U.S. 850 (1967)	33
United States v. *Fidanian*, 465 F.2d 755 (5th Cir.), *cert. denied*, 409 U.S. 1044 (1972)	33
United States v. *Prugh*, 479 F.2d 611 (8th Cir. 1973)	33
Whitney v. *SEC*, 604 F.2d 676 (D.C. Cir. 1979)	24, 25,26
STATUTES:	
15 U.S.C. § 77h(d) (Section 8(d) of the Securities Act of 1933)	19
15 U.S.C. § 77k (Section 11 of the Securities Act of 1933)	13,19,20
15 U.S.C. § 77l(2) (Section 12(2) of the Securities Act of 1933)	13,19,21
15 U.S.C. § 77q(a) (Section 17(a) of the Securities Act of 1933)	2, *passim*
15 U.S.C. § 77t(b) (Section 20(b) of the Securities Act of 1933)	9,10,22, 23,27,28, 33,34
15 U.S.C. § 78j(b) (Section 10(b) of the Securities Exchange Act of 1934)	1, *passim*
15 U.S.C. § 78o(b) (Section 15(b) of the Securities Exchange Act of 1934)	3, *passim*
15 U.S.C. § 78r (Section 18 of the Securities Exchange Act of 1934)	19

	Page
15 U.S.C. § 78t (Section 20 of Securities Exchange Act of 1934	19
15 U.S.C. § 78u(d) (Section 21(d) of the Securities Exchange Act of 1934)	9,10,22, 23,27,28, 33,34
15 U.S.C. § 80a-9(a)(2) (Section 9(a)(2) of the Investment Company Act of 1940)	32
RULES:	
17 C.F.R. § 229.20.3(f)(3) (Regulation S-K, item 3(f)(3))	32
17 C.F.R. § 230.252(c)(4)	32
17 C.F.R. § 240.10b-5 (Rule 10b-5)	1, *passim*
Federal Rules of Civil Procedure, Rule 65(d)	11,38,39
MISCELLANEOUS:	
Amicus Brief for AICPA in *SEC v. Aaron*, No. 79-66	2,8,11, 23
Berner and Franklin, "*Scienter and Securities Exchange Commission Rule 10b-5 Injunction Actions: A Reappraisal in the Light of Hochfelder,*" 51 N.Y.U.L. Rev. 769 (1976)	16
3A Blumenthal, "Securities and Federal Corporate Law", § 8.02(3) (1976)	31
"*Five Securities Lawyers To Conferees on Proposed Change of '34 Act § 21(e),*" 302 Sec. Reg. & L. Rep. (BNA) H-1 (May 14, 1975.)	35,36
Freeman, "*Administrative Procedures,*" 22 Business Lawyer 891 (1967)	30
"*Hearings on Proposed Amendments to the Securities Act of 1933 and the Securities Exchange Act of 1934 Before House Committee on Interstate and Foreign Commerce,*" 77th Cong., 1st Sess. (1941)	36

	Page
H.R. 4314, 73d Cong. 1st Sess. (1933)	35
H.R. 5480, 73d Cong., 1st Sess. (1933)	35
H.R. 11129, 84th Cong., 2d Sess. (1956)	36
H.R. Conf. Rep. No. 152, 73d Cong., 1st Sess. (1933)	17,18,23
H.R. Rep. No. 85, 73d Cong., 1st Sess. (1933)	16,17
H.R. Rep. No. 229, 94th Cong., 1st Sess. (1975)	36
Note, "*Developments in the Law-Injunction*" 78 Harv.L.Rev. 994, 1086 (1965)	33
S. 875, 73d Cong., 1st Sess. (1933)	17,35
S. 2544, 85th Cong., 1st Sess. (1957)	36
S. 1178, 86th Cong. 1st Sess. (1959)	36
S. 249, 94th Cong., 1st Sess. (1975)	36
S. Rep. No. 47, 47 Cong., 1st Sess. (1933)	35
S. Rep. No. 1756, 86th Cong., 2d Sess. (1960)	36
SEC Release No. 3230 (May 21, 1942)	13
2A Sutherland, *Statutes and Statutory Construction* §§47.17-.18. (4th ed. 1974)	16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-66

PETER E. AARON,
Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF OF SECURITIES INDUSTRY ASSOCIATION AS *AMICUS CURIAE*

PRELIMINARY STATEMENT

The Securities Industry Association (the "SIA") submits this brief *amicus curiae* in order to present its views as to the standards properly governing the issuance of an injunction against violations of Section 10(b) of the Securities Exchange Act of 1934 (the "1934 Act"), 15 U.S.C. § 78j(b) (1976) ("Section 10(b)"), Securities and Exchange Commission Rule 10b-5, 17 C.F.R. § 240.10b-5 (1979)

("Rule 10b-5") and Section 17(a) of the Securities Act of 1933 (the "1933 Act"), 15 U.S.C. § 77q(a) (1976) ("Section 17(a)"). Section 10(b), Rule 10b-5 and Section 17(a) are generally, and herein sometimes referred to as the "antifraud provisions" of the 1933 and 1934 Acts. The SIA submits that the Court of Appeals for the Second Circuit erred in its formulation and application of these standards and contends that the judgment of that Court should be reversed and remanded for further proceedings.

OPINIONS BELOW

The opinion of the Court of Appeals (Timbers, C.J.), affirming the decision of the District Court, is reported at 605 F.2d 612 (1979) and is printed in the Appendix to the Petition for Certiorari. The Opinion of the District Court which granted the Securities and Exchange Commission ("SEC" or "Commission") a permanent injunction against petitioner Peter E. Aaron is reported at Fed. Sec. L. Rep. (CCH) ¶ 96,043 (S.D.N.Y. 1977).

QUESTIONS PRESENTED

Whether the Securities and Exchange Commission is required to establish scienter as an element of a government enforcement action to enjoin violations of Section 10(b) of the 1934 Act and SEC Rule 10b-5, or of Section 17(a) of the 1933 Act.

ADDITIONAL STATUTE INVOLVED

In addition to the statutes printed in the Petition for Certiorari and the Brief *Amicus Curiae* of the AICPA, the

following provisions of Section 15(b)(4) of the Securities Exchange Act of 1934, 15 U.S.C. 78o(b)(4)(1976), are involved:

> The Commission, by order, shall censure, place limitations on the activities, functions, or operations of, suspend for a period not exceeding twelve months, or revoke the registration of any broker or dealer if it finds, on the record after notice and opportunity for hearing, that such censure, placing of limitations, suspension, or revocation is in the public interest and that such broker or dealer, whether prior or subsequent to becoming such, or any person associated with such broker or dealer, whether prior or subsequent to becoming so associated—
>
> * * *
>
> (C) is permanently or temporarily enjoined by order, judgment, or decree of any court of competent jurisdiction from acting as an investment adviser, underwriter, broker, dealer, or municipal securities dealer, or as an affiliated person or employee of any investment company, bank, or insurance company, or from engaging in or continuing any conduct or practice in connection with any such activity, or in connection with the purchase or sale of any security.
>
> (D) has willfully violated any provision of the Securities Act of 1933, the Investment Advisers Act of 1940, the Investment Company Act of 1940, this title, the rules or regulations under any of such statutes, or the rules of the Municipal Securities Rulemaking Board, or is unable to comply with any such provision.
>
> (E) has willfully aided, abetted, counseled, commanded, induced, or procured the violation by any person of any provision of the Securities Act of 1933,

the Investment Advisers Act of 1940, the Investment Company Act of 1940, this title, the rules or regulations under any of such statutes, or the rules of the Municipal Securities Rulemaking Board, or has failed reasonably to supervise, with a view of preventing violations of the provisions of such statutes, rules, and regulations, another person who commits such a violation, if such other person is subject to his supervision. For the purposes of this subparagraph (E) no person shall be deemed to have failed reasonably to supervise any other person, if—

> (i) there have been established procedures, and a system for applying such procedures, which would reasonably be expected to prevent and detect, insofar as practicable, any such violation by such other person, and
>
> (ii) such person has reasonably discharged the duties and obligations incumbent upon him by reason of such procedures and system without reasonable cause to believe that such procedures and system were not being complied with.

INTEREST OF THE SIA AS *AMICUS CURIAE*

The SIA is a national trade association representing approximately 500 brokers and dealers responsible for over 90 percent of the securities brokerage and investment banking business of the nation. Its membership is a cross-section of the diverse facets of the securities business and encompasses members of national securities exchanges as well as firms which are not members of such exchanges. The business of SIA's members includes retail and institutional brokerage, over-the-counter market-making, underwriting and other investment banking activities, various exchange floor functions, and management and distribution of mutual funds. Many of its members perform these services with regard to municipal

and government, as well as corporate, securities. The firms which comprise the SIA's membership are located across the nation and provide services to investors of every description. Almost all of SIA's members are registered as broker-dealers with the SEC. SIA is generally regarded as a principal spokesman for the securities industry before legislative, regulatory and judicial bodies.

Broker-dealers are, of course, at the very heart of the business regulated by the SEC pursuant to the Securities Act of 1933 and the Securities Exchange Act of 1934. In its administration of these statutes, the SEC has developed numerous regulations specifically delineating the boundaries of permissible conduct by broker-dealers. However, inasmuch as these specific rules speak to only a portion of the myriad activities of broker-dealers, the SEC's enforcement program respecting broker-dealers has frequently involved resort to injunction actions alleging violations of the two broad generic antifraud provisions at issue in the instant case.

Another friend of the Court, the American Institute of Certified Public Accountants ("AICPA"), has called the Court's attention to the grave, and frequently unwarranted, injury to business and reputation which flows from injunctions issued against persons, such as accountants and lawyers, having ancillary relationships to the securities business. Perhaps even more vulnerable to injury from an improper application of the antifraud provisions are those, such as SIA's members, who directly participate in the securities business.

If the antifraud provisions of the 1933 and 1934 Acts were expanded to include, for purposes of SEC injunction actions, negligent as well as intentional or reckless conduct, this lowered threshold of culpability would surely subject many more honest businessmen to "fraud"

charges. The mere filing of such charges can have seriously adverse consequences on the business of a broker-dealer which necessarily depends on its reputation for integrity and honesty.

Moreover, the 1934 Act is so structured that an injunction against a broker-dealer can be transformed by administrative SEC action from a judicial command that it commit no further violations to a temporary or permanent administrative exclusion from the securities business. Section 15(b) of the 1934 Act provides that, upon a finding that it is in the public interest to do so, the SEC can suspend or revoke the registration of a broker-dealer solely for the reason that it has been temporarily or permanently enjoined by a court of competent jurisdiction. It is clear, therefore, that the broker-dealer community is uniquely affected by the outcome of this case.

That unique interest has motivated SIA to evaluate carefully the points and arguments thus far submitted to the Court by the petitioner and the Court's other amici. SIA believes that there remain important considerations, relating to the circumstances under which a violation of Section 17(a) or Section 10(b) can be enjoined, which need to be brought to the Court's attention.

STATEMENT

Petitioner was an employee of E. L. Aaron & Company, Inc. of New York City. He is also the son of E. L. Aaron who was the owner of the brokerage firm and its chief executive.

In 1975, two salesmen in a branch office on Long Island, Messrs. Schreiber and Jacobson, made representations in the sale of the stock of a company called Lawn-a-Mat which the SEC alleged to be fraudulent.

The courts found that Peter Aaron was responsible for supervising these salesmen and that he had means to know from reports in the files that the statements they made were false.

In October 1975, Peter Aaron severed his relationship with E. L. Aaron & Co. and went into the commodities business. The SEC filed the instant lawsuit on February 26, 1976. The Lawn-a-Mat Corporation is in bankruptcy. Aaron & Co. is no longer in business.

The District Court's opinion stated:

> "Peter Aaron, although never an officer, director or shareholder of Aaron & Co., by virtue of his active participation in the management of the firm and his knowledge both of the firm's solicitation of LAM stock and the false and misleading statements being made by Schreiber and Jacobson in connection with that solicitation, must be held responsible along with Schreiber and Jacobson for the fraudulent representations that were made. [Citations omitted.] While Peter Aaron himself did not make any misrepresentations, by failing to stop Schreiber and Jacobson, he wilfully aided and abetted their violations of the anti-fraud provisions [Section 17(a) and Rule 10b-5] of the securities laws." *SEC* v. *E. L. Aaron & Co., Inc.*, Fed. Sec. L. Rep. (CCH) ¶ 96,043 at 91,684 (S.D.N.Y. 1977).

The court further held—"the fact that Peter Aaron intentionally failed to terminate the false and misleading statements made by Schreiber and Jacobson, knowing them to be fraudulent, is sufficient to establish his scienter under the securities laws." *Id.* at 91,685.

The Court of Appeals affirmed the decision of the District Court but did "not reach the question whether Aaron's conduct would support a finding of scienter." *SEC*

v. *Aaron*, 605 F.2d 612, 619 (2d. Cir. 1979). Instead it held that "proof of negligence alone will suffice" in an SEC enforcement action under Section 10(b), Rule 10b-5 and Section 17. This raised the issue now before this Court.

The injunction, issued by the District Court, and affirmed by the Second Circuit, ordered Peter Aaron to be permanently enjoined in broad statutory and regulatory language of Section 17 and Rule 10b-5 against employing devices, schemes or artifices to defraud, etc., in connection with the offer for sale, sale or purchase of "the common stock of Lawn-a-Mat Chemical and Equipment Corporation or any other securities." See Order Granting Injunction in *SEC* v. *E. L. Aaron & Co., Inc.*

SUMMARY OF ARGUMENT

I.

A. The rationale of this Court's decision in *Hochfelder* (for the reasons set forth in the AICPA *amicus curiae* brief) leads inexorably to the conclusion that in SEC injunction actions—as in private actions—proof of simple negligence alone is insufficient to establish a violation of Section 10(b) or Rule 10b-5.

B. *Hochfelder's* logic further dictates that Section 17(a) of the 1933 Act, whose prohibitory language is substantially identical to Rule 10b-5, be construed to require proof of scienter in SEC actions.

1. The title and language of Section 17(a), read in its context and its totality, clearly reflects a congressional intent to deal with fraud and not with negligence.

2. The legislative history of Section 17(a) speaks only in terms of fraudulent conduct. The Second

Circuit's contrary holding in *SEC* v. Coven, 584 F.2nd 1020 (2d Cir. 1978), relied upon below, is largely constructed on the sands of a clear misreading of the legislative history.

3. Given the "particularized" statutory scheme that Congress has adopted for the regulation of the securities industry—attaching varying consequences to different kinds of conduct (innocent, negligent and willful) and providing clearly defined remedies for certain specified negligent conduct—no inference that negligence alone is sufficient to establish a violation under Section 17(a) should be made. Furthermore, differentiating, in terms of scienter, between the substantially identical language of Rule 10b-5 and Section 17(a) would lead to the absurd result that the standards for injunctive relief would depend on the happenstance whether the defendant's conduct was in connection with a sale rather than a purchase of a security.

C. Sections 21(d) of the 1934 Act and Section 20(b) of the 1933 Act which authorize the SEC to seek injunctive relief against ongoing and threatened violations do not, and are clearly not intended, to modify the elements of the substantive violations of the antifraud provisions in cases where injunctive relief is sought.

D. The SEC, under Section 15(b)(4) of the 1934 Act can impose administrative disciplinary sanctions on broker-dealers for breaches of the antifraud provisions only upon a finding of a "willful" violation or, alternatively, on the basis of a prior injunction or criminal conviction. Eliminating the scienter requirement in SEC injunction actions would permit the SEC to short-circuit the clear congressional intent to impose such sanctions only upon proof of willful conduct.

II.

A. Federal regulatory statutes providing for injunctive relief invoke the equity jurisdiction of the federal courts and must be construed in accordance with age-old equitable principles. Such principles dictate that the courts will resort to an injunction only if necessary to deter future violations and require the "nice adjustment and reconciliation between public interest and private needs" required by *Hecht* v. *Bowles*, 321 U.S. 321, 329 (1944).

B. The Second Circuit failed to consider adequately the private injuries caused by injunctions. Under the lower threshold of the negligence standard, SEC injunction actions under the antifraud provisions undoubtedly will proliferate. The fraud charges made in such cases (even if negligence is all that can be proved) do serious damage to the reputation and business of broker-dealers against whom they are levelled, regardless of the ultimate outcome. This lower threshold also would give the SEC substantial additional leverage to exact from broker-dealers settlements, providing not only for injunctive relief, but for the imposition of severe administrative disciplinary sanctions. The issuance of antifraud injunctions based on negligent conduct permanently mars the reputation of the broker-dealer and subjects not only to criminal contempt penalties but also to other serious collateral consequences.

C. In contrast, no countervailing "public interest", in terms of SEC enforcement policy, can be shown for lowering the threshold for injunctive relief under the antifraud provisions to negligence alone. Criminal contempt is not an effective tool against negligence since willfullness itself is an essential prerequisite for a finding of criminal contempt.

III.

A. This Court, on remand, should provide the lower courts with guidance on the proper application of Section

20(b) of the 1933 Act and Section 21(d) of the 1934 Act which expressly limit injunctive relief to cases where there is adequate proof of an ongoing or threatened future violation.

B. This Court, consistent with its prior decisions, should further instruct the lower courts that an injunction whose prohibitions are phrased only in broad and general language of Section 17(a) and Rule 10b-5—as does the decree before the Court here—fails to comply with the specificity requirements of Rule 65(d) of the Federal Rules of Civil Procedure and the notions of basic fairness which require that the potent weapon of criminal contempt charges be limited to cases where there is a specific and reasonably detailed judicial command.

ARGUMENT

I. THE SEC IS NOT ENTITLED TO AN INJUNCTION RESTRAINING VIOLATIONS OF THE ANTIFRAUD PROVISIONS OF THE 1933 AND 1934 ACTS UPON PROOF OF NEGLIGENCE ALONE

A. Section 10(b) and Rule 10b-5 Require Proof of Scienter.

In *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185 (1976) (hereinafter *Hochfelder*), this Court held that a private cause of action for damages will not lie "under § 10b and Rule 10b-5 in the absence of any allegation of 'scienter'—intent to deceive, manipulate, or defraud." *Id.* at 193.

The *Amicus* Brief filed by the AICPA demonstrates that this Court's considerations in *Hochfelder* regarding "statutory language, history, structure and policy" lead irresistibly to the conclusion that "scienter is also required in SEC injunction actions" under Section 10(b) and Rule 10b-5. AICPA Brief at 8. The SIA fully agrees with and

strongly supports the arguments made by the AICPA. It does not reiterate these arguments here only to avoid burdening this Court with unnecessary duplication.

Given the persuasive counterindications in *Hochfelder* (as discussed in AICPA brief) of any congressional intent to make the scienter requirement inapplicable to SEC injunctions as distinct from private actions, the only possible basis remaining for such a distinction would necessarily have to be premised on what the Second Circuit below referred to as the "increased effectiveness of government enforcement actions predicated on a showing of negligence alone", 605 F.2d at 621. This Court, however, has "emphasized that generalized references to the 'remedial purposes' of the 1934 Act will not justify reading a provision 'more broadly than its language and the statutory scheme reasonably permits'." *Touche Ross & Co.* v. *Redington*, 99 S.Ct. 2479, 2490 (1979). In that case, the Court added that "the ultimate question is one of congressional intent, not one of whether this Court thinks that it can improve upon the statutory scheme that Congress enacted into law." *Id.*

In any event, requiring scienter for the issuance of injunctions in SEC actions brought under Rule 10b-5 (or Section 17(a) of the 1933 Act) does not leave the SEC without an impressive arsenal to protect investors. Broker-dealers are subject to administrative sanctions imposed under Section 15(b) of the 1934 Act and, as discussed below, Section 15(b)(4)(E) specifically covers failure to exercise reasonable supervision by a broker-dealer—the very conduct found to have occurred in this case. A holding that negligence alone is not a proper basis for the issuance of an injunction under the antifraud provisions would leave fully intact the SEC's power to obtain injunctive relief not only in cases of intentional conduct, but in cases of reckless conduct as well. *See Hochfelder*, 425 U.S. at 194 n.12. It would exclude in-

junctive relief only in cases of simple negligence, a type of conduct for which Congress simply did not deem it necessary to provide the potent weapon of an injunction. Furthermore, as specifically provided for in various sections of the Acts, negligent conduct subjects sellers of securities and other persons to claims for monetary damages. *See e.g.*, Sections 11 and 12(2) of the 1933 Act, 15 U.S.C. §§77k, 77l(2) (1976). Criminal penalties, of course, are available for any willful violations of both the 1933 and 1934 Acts.

B. Section 17(a) Also Requires Proof of Scienter.

The logic of *Hochfelder* applies with similar force to Section 17(a) of the 1933 Act.

The language of Section 17(a) is identical to Rule 10b-5 except that Rule 10-5 applies to any transaction "in connection with the purchase or sale of a security" while the prohibitions of Section 17(a) are limited to the "offer or sale" of a security. The prohibitions of Section 17(a) were extended to purchase transactions by the adoption of Rule 10b-5 in 1942 to close a "loophole in the protections against fraud administered by the Commission by prohibiting individuals or companies from buying securities if they engage in fraud in their purchase." SEC Release No. 3230 (May 21, 1942); *see Hochfelder*, 425 U.S. at 212-13 n.32.

The only other pertinent distinction between Section 17(a) and Rule 10b-5 is that Rule 10b-5 was adopted under Section 10(b) of the 1934 Act which makes unlawful the use or employment of "any manipulative or deceptive device or contrivance" in contravention of the Commission's rules. In *Hochfelder* this Court held that the scope of Rule 10b-5 was limited by the statutory provision under which it was adopted. In contrast, Section 17(a) must be construed on the basis of its own statutory language and intent.

An analysis, however, of the language, legislative history, and structure of the 1933 and 1934 Acts clearly

demonstrates that "scienter—intent to deceive, manipulate or defraud" is an essential element of an action based on Section 17(a).

The AICPA did not brief this issue. It represents, however, an issue of great importance to the SIA. Unless the identical prohibitions of Section 17(a) and Rule 10b-5 are similarly construed to require proof of scienter, future SEC injunction actions, wherever possible, would simply rely on Section 17(a) to obtain injunctive relief on the basis of negligence alone. As one District Judge noted, "[s]uch a ruling would signal the easy circumvention and swift desuetude of *Ernst.*" *Malik* v. *Universal Resources Corp.*, 425 F. Supp. 350, 363 (S.D. Cal. 1976).

I. The Language of Section 17(a)

"The starting point in every case involving construction of the statute is the language itself." *Hochfelder*, 425 U.S. at 197.

The title of Section 17(a), "Fraudulent Interstate Transactions," plainly connotes the overriding purpose and intent of the provision.

Moreover, the initial provision of Section 17(a)(1) makes it unlawful "in the offer of sale of any securities" "to employ any *device, scheme or artifice to defraud.*" (Emphasis added.) No language could more clearly be written in terms of "scienter" as defined in *Hochfelder.* Similarly, subsection 3 of Section 17(a) prohibits any "transaction, practice or course of business which operates or would operate *as a fraud or deceit* upon the purchaser."

Several circuits in post-*Hochfelder* decisions have read the language of 17(a)(1) as requiring scienter. The Fifth Circuit noted in *Steadman* v. *SEC*, 603 F.2d 1126, 1133 (5th

Cir. 1979), that the "phrases—devices to defraud, schemes to defraud, artifice to defraud—carry strong implications of intentional conduct. We do not think Congress would have used such language if it meant to reach merely negligent actions." In *Sanders* v. *John Nuveen & Co., Inc.*, 554 F.2d 790, 795 (7th Cir. 1977), the Seventh Circuit held that "[p]roof of scienter is unquestionably required as to [both] subsections 1 and 3 which specifically refer to fraud." The Second Circuit in *SEC* v. *Coven*, 581 F.2d 1020 (2d Cir. 1978), sought to avoid the plain import of the phrase in subsection (3) "operates as a fraud upon the purchaser." *Id.* at 1026. It construed this language "to focus attention on the *effect* of potentially misleading conduct on the public, not on the culpability of the person responsible." *Id.* Such an analysis ignores this Court's statement in *Hochfelder* that "logic of this effect oriented approach would impose liability for wholly faultless conduct where such conduct results in harm to investors, a result the Commission would be unlikely to support." 425 U.S. at 198.

Some courts have also attempted to pick and choose among the subsections of Section 17(a) suggesting that while Section 17(a)(1) and 17(a)(3) require a finding of scienter, Section 17(a)(2), which prohibits the obtaining of "money or property by means of any untrue statement of a material fact" without specifically referring to the word fraud, does not require proof of scienter. *See, e.g., SEC* v. *Steadman, supra.*

Such piecemeal statutory interpretation is plainly inconsistent with congressional intent as reflected in the title and in the opening provision of the section. It is inconsistent with this Court's holding in *Hochfelder* that the language of the comparable provisions of Rule 10b-5 cannot be "viewed in isolation." 425 U.S. at 212. It ignores the well-known doctrine of "ejusdem generis" (meaning "of the same kind or species") under which a broader

provision of the statute is limited and controlled by the specific statutory language. 2A Sutherland, *Statutes and Statutory Construction* §§ 47.17-.18 (4th ed. 1974). Further, segregating subsections (2) and (3) from the overall "fraud" direction of Section 17(a) on the theory that these subsections are directed to the effect rather than the culpability of conduct, is inconsistent with *Hochfelder's* rejection of such an approach as logically leading to the imposition of liability for "wholly faultless conduct." 425 U.S. at 198.

The correct approach is, we submit, as recently suggested by one commentator, "that sections 17(a)(1)-(3) have the same area of operation and were not intended to prohibit three distinct types of conduct. [Citations omitted.] Therefore the three clauses of Section 17(a) should be read together to convey one meaning, which is to proscribe fraudulent conduct, not mere negligence, thereby requiring proof of scienter."[1]

2. Legislative History of Section 17(a)

The legislative history plainly confirms that congressional intent in enacting Section 17(a) was to deal with "fraud" and not with negligence. The House Report which accompanied the bill containing the version of Section 17(a) which was ultimately adopted summarized the substance of the Commission's powers under the bill as follows:

> "The Commission may apply to the courts to enjoin any *device, scheme, or artifice to defraud, employed in connection with* the sale in interstate or foreign commerce of any securities, whether new or already outstanding." H.R. Rep. No. 85, 73d Cong., 1st Sess. 6 (1933). (Emphasis added.)

This is the only discussion of Section 17(a) in the reports, hearings or debates except for recitations of the statutory language.

The Second Circuit below in holding that negligence alone was sufficient for issuing an injunction under Section 17(a) relied almost exclusively on its earlier decision in *SEC* v. *Coven*, 581 F.2d at 1027, which in turn was largely based on a plain misreading of the legislative history. In *Coven* much is made of the fact the words "willfully" and "intent to defraud" appeared in the original Senate version of Section 17(a) and that the parallel House provision which contained no specific reference to intent was ultimately adopted. The Second Circuit concluded that Congress thereby "opted for liability without willfulness, intent to defraud or the like." *Id.*

The Conference Report strongly suggests, however, that the House version of Section 17(a) was adopted, not because it omitted specific reference to intent, but, for completely unrelated reasons relating to vicarious liabilities.[2]

---

[1] R. Berner and R. Franklin, *Scienter and Securities Exchange Commission Rule 10b-5 Injunction Action: A Reappraisal in the Light of Hochfelder*, 51 N.Y.U. L. Rev. 769, 796-97 n.221 (1976).

[2] The Senate precursor of Section 17(a), introduced as Section 13 of S.875, made it unlawful to defraud a purchaser by employing or acting as a "dummy." The Conference Report explained that "[t]he Senate amendment contained provisions referred to as 'dummy provisions' which were calculated to place liability on a person who acted through another" and that "[t]he House bill did not contain such provisions." H.R. Conf. Rep. No. 152, 73rd Cong., 1st Sess. 27 (1933). The Conference Report noted that "[t]he various provisions of the Senate amendment on this subject have been welded into one and incorporated as a new section in the substitute"—*i.e.*, the present Section 15 of the 1933 Act imposing liability on controlling persons. *Id.*

The Conference Report begins with the statement that "differences between the House bill and the substitute agreed upon by the conferees *are noted in the following discussion*, except for incidental changes made necessary to harmonize various provisions effected by the agreements reached, and minor and clarifying changes to make clear and effective the administrative procedure provided for and to remove uncertainties." (Emphasis added.) H.R. Conf. Rep. No. 152, 73d Cong., 1st Sess. 24 (1933). The Conference Report, however, makes no mention whatsoever of this supposedly important distinction between the House version of Section 17(a) which was adopted and the comparable provision in the Senate bill.

If Congress had intended, as the Second Circuit suggests in *Coven*, to opt "for liability without willfullness, intent to defraud or the like," 581 F.2d at 1027, this clearly would have been considered one of the substantive changes to be discussed in the Conference Report rather than an "incidental" or "harmonizing" modification. But the Conference Report contained no such discussion. The Conference Report evidently did not regard this to be a substantive change as characterized by the Second Circuit. As shown above, the House version adopted by the Conference was clearly written in terms of "fraud" which necessarily includes the element of scienter.

Furthermore, the fact the Conference Report specifically mentions that the choice between the Senate and House versions was made for an entirely different reason related to vicarious liability and makes no reference to the much more basic considerations suggested by the Second Circuit in *Coven*, is, we think, conclusive.

3. Structure of the 1933 and 1934 Acts

As this Court concluded in *Hochfelder*, "[i]t is thus evident that Congress fashioned standards of fault in the

express civil remedies in the 1933 and 1934 Acts on a particularized basis." 425 U.S. at 200.

For some conduct, Congress attached liability or other consequences without any fault. Section 11(a) of the 1933 Act imposes liability on the issuer for misleading statements in registration statements regardless of fault. Similarly, Section 8(d) of the 1933 Act, 15 U.S.C. §77h(d) (1976), authorizes the Commission to issue a stop order suspending the effectiveness of a registration statement containing a false and misleading statement regardless of whether it is intentional or inadvertent.

Other provisions impose liability only for failure to exercise reasonable care. Thus, Section 11(b)(3) of the 1933 Act imposes liability on experts such as accountants only upon a showing of failure to exercise reasonable care with respect to that portion of the registration statement for which they are responsible. Similarly, Section 12(2) of the 1933 Act limits liability by sellers of securities to knowing or negligent misrepresentations.

Under other provisions "good faith" is a complete defense—*i.e.*, with respect to liability under Section 18 of the 1934 Act, 15 U.S.C. § 78r (1976), for false statements in SEC filings or with respect to the liability under Section 20 of the 1934 Act, 15 U.S.C. § 78t (1976), of a controlling person for the acts of the controlled person.

Given this "particularized" statutory scheme, this Court said in *Hochfelder* that "ascertainment of congressional intent with respect to the standard of liability created by a particular section of the Acts must therefore rest primarily on the language of that section." 425 U.S. at 200.

As discussed above, the language of Section 17(a) is plainly directed towards fraudulent conduct. Liability for negligence, as Congress has specifically provided for other conduct, should therefore not be lightly implied. Congress has made the judgment to attach differing consequences to different types of conduct and has chosen not to attach

liability or other consequences to negligent conduct except as specifically provided in other provisions of the federal securities laws. This is not to say that other forms of negligent conduct may not be a matter of appropriate concern by the SEC. The fact is simply that Congress, in neither Section 17(a) of the 1933 Act nor Section 10(b) of the 1934 Act has chosen to deal with such a concern.

This Court stated in *Touche Ross & Co.* v. *Redington*, 99 S. Ct. at 2490, that "[t]he ultimate question is one of congressional intent, not one of whether this Court thinks it can improve upon the statutory scheme that Congress enacted into law." If the SEC feels that negligent conduct by broker-dealers or others is of sufficient concern to require remedies in addition to those Congress has authorized, the proper course is for the SEC to seek appropriate amendments to the 1933 and 1934 Acts to deal with such conduct.

Furthermore, whenever Congress in the 1933 and 1934 Acts has established liability for negligence, it, at the same time, defined the classes of persons who have a duty to exercise care, and the standard of care required to avoid liability.

Thus, Section 11(b)(3)(B)(C) provides that liabilities for untrue statements in registration statements shall be limited to defined classes of persons such as signatories of registration statements, officers, directors and experts. Moreover, it provides that no liability shall be imposed on a person who "shall sustain the burden of proof" that "he had, after reasonable investigation, reasonable ground to believe and did believe at the time such part of the registration statement became effective that the statements therein were true ...." Section 11(c) further provides that for purposes of determining "what constitutes reasonable investigation and reasonable gounds for belief, the standard of reasonableness shall be that

required of a prudent man in the management of his own property." Similarly, Section 12(2) of the 1933 Act imposes liability only on offerors and sellers of securities and only where the defendant is not able "to sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known of such untruth or omission."

Congress followed a similar approach in Section 15(b)(4)(E) of the 1934 Act which provides for the imposition of administrative sanctions on a broker-dealer who "has failed reasonably to supervise, with a view to preventing violations ... another person who commits such a violation." Sanctions can be imposed only "if such other person is subject to his supervision." Moreover, the statute provides that the requirement of reasonable supervision shall have been met if, *inter alia*, there are "established procedures which would reasonably be expected to prevent and detect" such violation and discharge by the supervisor of his duties under such procedures.

An interpretation of Section 17(a) authorizing the issuance of injunctive relief upon the basis of negligence alone would leave the courts without any comparable standards of duty or care or limitations on liability where compliance with minimum standards of care can be established. Congress, which neither in the 1933 Act nor in the 1934 Act imposed civil liability or administrative sanctions for negligence without the protections inherent in such standards and limitations, should not be assumed to have intended to do so in Section 17(a) of the same Act.

The Court noted in *Hochfelder* "[t]he 1933 and 1934 Acts constitute interrelated components of the federal regulatory scheme governing transactions in securities." 425 U.S. at 206. The construction of Rule 10(b) as requiring scienter in injunction actions and a contrary construction of the substantially identical language in Section 17(a) would create intolerable and unintended

dissymmetry in the statutory scheme of the 1933 and 1934 Acts. It would provide different standards of proof for identical types of conduct depending on the mere happenstance of whether a purchaser or a seller was defrauded. For example, if such differing interpretations were adopted a broker-dealer making an untrue pessimistic statement about the state of a company causing a customer to sell his shares could only be enjoined under a scienter standard while the same broker-dealer making optimistic statements causing a customer to buy shares could be subject to an injunction for mere negligence. Such a result would be contrary to the original intent of Rule 10b-5 to make the "fraud" provisions applicable equally to purchasers and sellers.

C. Section 21(d) of the 1934 Act and the Comparable Provisions of Section 20(b) of the 1933 Act Define and Limit the SEC's Injunctive Powers and Do Not Enlarge the Substantive Antifraud Provisions of the Act.

The Second Circuit in *Aaron* conceded that "the language of Section 10(b)—of course is the same regardless of whether the action is brought by the SEC or a private individual." 605 F.2d at 621. However, the Second Circuit "look[s] to § 21(d)" (*id.*) of the 1934 Act for a broadening of Rule 10b-5 to include merely negligent actions where an injunction rather than private damages are sought. The Second Circuit's reliance on Section 21(d), 15 U.S.C. § 78u(d) (1976), to achieve this result is entirely misplaced. Similarly, the substantially identical provisions of Section 20(b) of the 1933 Act, 15 U.S.C. § 77t(b)(1976), do not broaden the scope of Section 17(a) of that Act.

As this Court recently emphasized in construing the statutory authority of the Commission under the 1934 Act "[t]he first and most salient point . . . is the language of the statute." *SEC* v. *Sloan*, 436 U.S. 103, 111 (1978).

The express language of Section 21(d) limits the statutory authority of the Commission to invoke the equity jurisdiction of the United States only in circumstances where "it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the Act or any rules promulgated thereunder." Section 21(d) does not contain the slightest indication that it is intended to modify for purposes of SEC injunction action the clear "fraud" language in Section 17(a), Section 10(b) and Rule 10b-5.

Absent any support in the language of Section 21(d) the Second Circuit cites as its only support in the legislative history the same legislative history on which it relied in *Coven* for its holding that no scienter is required under Section 17(a). The Second Circuit's argument is that the Congress in adopting the House version of Section 17(a) of the 1933 Act and rejecting a Senate version which had a specific reference to intent "clearly indicated its rejection of a scienter standard for injunctive relief." 605 U.S. at 622 n. 14. This same rejection, so the argument appears to go, carries over into Section 20(b) of the 1933 Act and from there to Section 21(d) of the 1934 Act. As discussed above, the basic premise of this convoluted argument is erroneous. The legislative history—*i.e.*, the Conference Report—makes it quite clear that the choice between the House and Senate versions of Section 17(a) was not predicated upon any determination to reject the scienter standard for injunctive relief but on other unrelated grounds.[3]

---

[3] No other support is cited by the Second Circuit for its decision except for the so-called "legislative discussion" in 1975 when Section 21(d) was neither enacted nor amended in any substantive manner but merely renumbered. No weight may be attached to such legislative discussion for the reasons set forth in the AICPA Brief at 14-15.

D. The Elimination of the Scienter Requirements in SEC Injunction Actions Under the Antifraud Provisions Would Circumvent the Specific Statutory Requirements of Section 15(b) of the 1934 Act.

Section 15(b)(4) of the 1934 Act empowers the Commission to impose administrative disciplinary sanctions of a most serious nature on broker-dealers. Such sanctions include censure, limitations on the activities, functions or operations of the broker-dealer, or a suspension or ultimately a revocation of the broker-dealer's registration, depriving him of the right to continue in business. Such sanctions, however, when based on violations of the antifraud provisions, "result in stigmatizing the defendant irrespective of the formal sentence meted out." *Whitney* v. *SEC*, 604 F.2d 676, 681 (D.C. Cir. 1979).

Such sanctions—to the extent they are based upon violations of the antifraud provisions of the federal securities laws—may be imposed upon a broker-dealer through two differing avenues:

> (1) on the basis of a finding after an evidentiary hearing that the broker-dealer "willfully" violated or "willfully" aided and abetted a violation of the federal securities laws, or
>
> (2) on the basis that the broker-dealer is permanently enjoined from engaging in or continuing any conduct in connection with the purchase or sale of any security, or is convicted of certain crimes. See Section 15(b)(4).

If the Commission initiates an administrative proceeding under Section 15(b)(4) without first obtaining injunctive relief, it could not impose administrative sanctions for violations of the antifraud provisions in the

absence of a finding of willful misconduct. As the D.C. Circuit recently stated in *Whitney* v. *SEC:*

> "Section 15(b) by its terms requires that a person have 'willfully' violated the securities laws, [citation omitted], and we think 'willfullness' in this sense is more or less congruent with *Hochfelder's* use of 'scienter'." 604 F.2d at 682 n.23.

However, if scienter were to be eliminated from the requirements for injunctive relief under the antifraud statutes, the Commission could easily short-circuit the clear purpose and intent of Section 15(b) by obtaining an injunction based on negligence in a federal court and then on the basis of that injunction alone imposing administrative sanctions on the broker-dealer.[4]

Furthermore, congressional intent generally to limit the imposition of administrative sanctions to cases of willful conduct is confirmed by a 1964 amendment to Section 15(b). This amendment, Section 15(b)(4)(E), provides for the imposition of sanctions upon finding that a broker-dealer "has failed reasonably to supervise, with a view to preventing violations of the provisions of such statutes, rules and regulations, another person who commits such a violation if such other person is subject to his supervision." Compliance with established and adequate supervisory procedures is a complete defense to any charges of negligence under this provision.

This carefully circumscribed provision is the first and *only* case where Congress has permitted the SEC to impose

[4] The purpose of the provision authorizing the SEC to impose sanctions on the basis of a prior injunction is clearly not to impose an alternative standard of liability but merely to avoid the need to relitigate in the administrative proceedings issues already decided in a court proceeding.

on broker-dealers administrative sanctions on the basis of conduct other than willful. It is significant that at the same time that Congress adopted this provision, it added as a part of the same subsection as further ground for the imposition of administrative sanctions a finding that the respondent "has willfully aided, abetted, counseled, commanded, induced or procured" the violation of any of the federal securities laws. Congress thus made a clear distinction between willful conduct in one case and negligent conduct in the other. Moreover, the need to amend Section 15(b)(4) to include failure to supervise as a separate ground for sanctions reflects congressional recognition that such failure reasonably to supervise would not constitute a willful violation of the antifraud provisions of the 1933 and 1934 Acts for the purposes of imposing administrative sanctions.[5]

[5] The congressional action specifically authorizing the imposition of the administrative sanctions for a failure reasonably to supervise does not imply a general congressional willingness to permit such sanctions to be imposed for negligent conduct. The District of Columbia Circuit in *Whitney* v. *SEC*, 604 F.2d at 681, recognized a very real distinction between the special "stigmatizing" effect of sanctions imposed for violations of the antifraud provisions and sanctions imposed on other grounds. It therefore held that every sanction imposed under Section 15(b) which depends on a finding of fraud must be sustained by clear and convincing evidence as distinct from the mere preponderance of the evidence which will suffice to sustain sanctions on other grounds.

II. THE AVAILABILITY AND ISSUANCE OF INJUNCTIVE RELIEF IS GOVERNED BY ESTABLISHED EQUITABLE PRINCIPLES

A. The Potent Weapon of Injunctive Relief Is Available Only Where There Is A Need To Deter Future Unlawful Conduct and Where the Public Interest Outweighs Countervailing Private Needs.

Sections 20(b) of the 1933 Act and 21(d) of the 1934 Act, by invoking the equity jurisdiction of the courts, bring into play established equitable principles limiting and governing the use of the Court's equitable powers. This Court's decision in *Hecht Co.* v. *Bowles*, 321 U.S. 321 (1944), recently reaffirmed in *Rondeau* v. *Mosinee Paper Co.*, 422 U.S. 49 (1975), makes it very clear that federal regulatory statutes providing for injunctive relief do not override these underlying equitable principles but must be construed in accordance therewith.

In *Hecht* v. *Bowles*, the regulatory provision involved was Section 205 of the Emergency Price Control Act of 1942 which provided that upon a showing that a person "has engaged or is about to engage" in practices violating the statute a "permanent or temporary injunction, restraining order or other order shall be granted." 321 U.S. at 322. The Price Administrator therefore contended that upon a showing of any violation of that Act the issuance of an injunction was mandatory. This Court, however, clearly rejected that contention as being a "drastic departure from the traditions of equity practice" "with a backgound of several hundred years of history" which it would not imply absent an unequivocable statement of congressional purpose. *Id.* at 329. This Court added:

> "The historic injunctive process was designed to deter, not to punish. The essence of equity jurisdiction has been the power of the Chancellor to do equity and to

mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims. We do not believe that such a major departure from that long tradition as is here proposed should be lightly implied." *Id.* at 329-30.

Applying these principles this Court reversed a lower court order granting an injunction against the department store even though "numerous violations" of that regulation were discovered, because the violative pricing actions were all made "in good faith and without intent to violate the regulations" (*id.* at 324-25), and vigorous steps were taken to prevent their recurrence.

This Court's decision in *Hecht* v. *Bowles* reaffirms established equitable principles of obvious relevance here—*i.e.*, that injunctions will be issued by a court of equity only if necessary and appropriate to "deter" future violative conduct, and not to punish a defendant by tagging him with an injunction, and that Courts will not perfunctorily issue unnecessary injunctions even if seemingly required by the literal language of the regulatory statute.[6]

Moreover, in *Hecht* this Court held that in determining whether or not to grant an injunction, the courts must make a "nice adjustment and reconciliation between public interest and private needs." *Id.* at 329. In *Aaron*

[6] As noted above, the Act involved in *Hecht* v. *Bowles* provided for the issuance of an injunction upon a showing that a person "has engaged or is about to engage in violative conduct." In contrast, Section 21(d) of the 1934 Act and Section 20(b) of the 1933 Act require that the SEC, as a prerequisite for the issuance of an injunction, prove that the defendant "is engaged or about to engage" in violations of the 1933 and 1934 Acts.

the Second Circuit made short shrift of the need to balance the public interest and private needs, stating that its "view that the increased effectiveness of government enforcement actions predicated on a showing of negligence alone outweighed the danger of potential harm to those enjoined from violating the securities laws." 605 F.2d at 621.

B. The Harmful Consequences of Subjecting Broker-Dealers and Other Persons to Injunction Actions Based on Negligence Alone Far Outweigh the Countervailing Public Interest Served By Such an Extension of the SEC's Injunctive Powers.

The potential adverse impact, especially on broker-dealers, of eliminating the scienter requirement in SEC injunction actions under the antifraud provisions may be summarized briefly as follows:

1. Proliferation of SEC Injunction Actions

If the SEC could prevail in an injunction action on a finding of negligence alone, it must be assumed that the SEC would institute an injunctive proceeding under the antifraud provisions in more cases and on the basis of less evidence that it does so today. In the securities business, where so much is necessarily based on trust and reputation, the institution of an SEC injunction action under the antifraud provisions of the 1933 and 1934 Acts can have very serious consequences for any broker-dealer. Such complaints filed by the SEC would, in the normal course, as it did in this case, allege intentional conduct (even though the action is actually grounded on negligence). Moreover, in any event the press in their reports will not make such distinctions and will announce that a brokerage firm or individual broker-dealer has been the subject of "SEC fraud charges." Even an ultimate finding of innocence,

after long and costly litigation, cannot undo the impact of such adverse publicity. In *Securities Investor Protection Corp.* v. *Barbour*, 421 U.S. 412 (1975), this Court stated that:

> "Except with respect to the solidest of [brokerage] houses, the mere filing of an action predicated upon allegations of financial insecurity might often prove fatal." *Id.* at 422.

This Court itself compared the SIPC proceedings to administrative broker-dealer proceedings under the 1934 Act.[7]

2. Increased SEC Leverage in Settlements of Enforcement Actions

Most SEC injunction actions against broker-dealers as against other defendants are settled without a trial on the merits. Any settlement of an injunction action against a broker-dealer necessarily involves a resolution of the administrative sanctions which by reason of the consent injunction the SEC could impose upon the broker-dealer. The adoption of the negligence standard, by lowering the standard of proof required in SEC injunction actions, would give the SEC additional leverage to extract from defendant broker-dealers not only broad injunctions similar to that issued in this case, but at the same time to insist on the acceptance of harsh administrative sanctions. These considerations are of unusual importance since few broker-dealers have the resources or stamina to engage in

[7] The Court's opinion, quotes from Freeman, *Administrative Procedures*, 22 Business Lawyer 891, 897 (1967):

> "'The moment you bring a public proceeding against a broker-dealer who depends upon public confidence in his reputation, he is to all intents and purposes out of business.'" 421 U.S. at 422 n.5.

extended litigation with the SEC, and also little inclination to litigate with the government agency which has broad regulatory powers over them on a regular basis.

3. Impact of Injunction

In the event that after a trial or settlement an injunction is issued on the basis of negligence alone, the adverse impact is magnified. The issuance of an antifraud injunction permanently mars the record and reputation of a broker-dealer. Neither the press nor customers are likely to make differentiations between antifraud injunctions granted on a finding of negligence alone or on a finding of scienter. Fraud, certainly in ordinary parlance, connotes "scienter."

Moreover, "the real sanction of the injunction arises from the fact that from that point on defendants proceed at their peril and that without indictment and without a jury trial, they may incur criminal sanctions in the event of further sales deemed to be a violation of . . . the fraud provisions." 3A Blumenthal, *Securities and Federal Corporate Law*, § 8.02[3] at 8-12 (1976 rev.), quoted in *SEC* v. *Cenco, Inc.*, 436 F. Supp. 193, 198 (N.D. Ill. 1977).

The risk inherent in any injunction is substantially increased by the broad scope of the injunction in this case which applies, without limit to each and every violation of the antifraud provisions. The antifraud provisions themselves are so broad as to comprehend not only the violation of many other provisions of the federal securities laws, but also a broad range of conduct which in the rapidly evolving interpretation of these provisions may in the future be deemed to be fraudulent.

4. Collateral Administrative Consequences

As discussed above, mere issuance of an injunction, be it for negligence or otherwise, triggers the provisions of Section 15(b) which permits the Commission, based solely

upon the issuance of an injunction, to impose severe administrative sanctions on broker-dealers or associated persons. While the Commission is subject to some judicial review in its assessment of a sanction, the Commission has broad discretion to impose such administrative sanctions once a broker-dealer has become subject to an injunction.

The issuance of an injunction also has other collateral consequences which can have a serious impact on a broker-dealer or associated persons.[8]

C. No Valid Enforcement Purpose Is Served By Issuing An Injunction On the Basis of Negligence Alone

Balanced against the grave consequences and serious ramifications of an injunction, particularly one issued against a broker-dealer, there is little if anything to be gained, in terms of SEC enforcement policy, by providing for issuance of antifraud injunctions on a finding of mere negligence alone.

---

[8] For example, the Regulation A exemption from registration for the sale of securities by an issuer not exceeding $1,500,000 is, under Rule 252(c)(4) of Regulation A, 17 C.F.R. §230.250(c)(4) (1979), not available if, among others, any of the officers or directors of the issuer, the underwriter or any of the underwriter's officers or directors have been enjoined on the basis of a securities law violation. The unavailability of the Regulation A exemption may have a serious impact on the underwriting business of a broker-dealer.

Section 9(a)(2) of the Investment Company Act of 1940, 15 U.S.C. §80a-9(a)(2) (1976), bars any person who is subject to an injunction from serving as an employee, officer or director of an investment company.

Pursuant to Regulation S-K, item 3(f)(3), 17 C.F.R. §229, 20.3(f)(3) (1979), a corporation in its annual report filed with the SEC, its proxy statement and is any registration statement, is required to disclose any SEC injunction entered against any director or executive officer within the last five years.

The ultimate deterrent of an injunctive order is the criminal contempt power of the courts. The anomaly of an antifraud injunction issued on the basis of a finding of negligence is that it would appear that the subject of the injunction could not be found in criminal contempt for negligent conduct—the only type of conduct which gave rise to and which should therefore be deterred by the injunction. It is well established that a person will be held to be in criminal contempt of an injunction only upon a finding of willfullness—*i.e.*, actions which are "deliberate, voluntary or intentional as distinguished from accidental, inadvertent or negligent." *United States* v. *Fidanian*, 465 F.2d 755, 760 (5th Cir. 1972), *cert. denied*, 409 U.S. 1044 (1972).[9]

In any event, an injunction is, at best, of questionable effect to prevent a broad range of unspecified negligent conduct, conduct which by definition is unintentional. Furthermore, since a propensity to commit intentional acts of fraud or deceit hardly can be inferred from negligent conduct, no valid enforcement purpose or need is served by the injunction to the extent that it seeks to enjoin fraudulent, in addition to negligent, conduct.

III. THIS COURT SHOULD INSTRUCT THE LOWER COURTS AS TO THE APPROPRIATE STANDARDS AND FORM OF INJUNCTIVE RELIEF

This Court, on remand, should give the lower courts directions on important issues relating to the standards for determining if any injunction is appropriate under Section 21(d) of the 1934 Act or Section 20(b) of the 1933 Act and the form of injunctive relief to be granted.

---

[9] *See also United States* v. *Prugh*, 479 F.2d 611 (8th Cir. 1973); *United States* v. *Custer Channel Wing Corp.*, 376 F.2d 675 (4th Cir.), *cert. denied*, 389 U.S. 850 (1967); Note, *Developments in the Law—Injunctions*, 78 Harv. L. Rev. 994, 1086 (1965).

A. The Applicable Standards for Injunctive Relief under Section 20(b) of the 1933 Act and Section 21(d) of the 1934 Act

As discussed in Section I.C above, Section 21(d) of the 1934 Act and the comparable provisions of Section 20(b) of the 1933 Act establish prerequisites for injunctive relief in addition to a finding of a substantive violation in the past. They require a determination that the defendant "is engaged or about to engage in violative conduct."

The District Court based its finding that there is "a likelihood of Peter Aaron's further violations of these securities laws in the future" largely on the fact that "while not presently in the securities business," he "clearly expressed at trial a strong interest in returning to the securities industry," *SEC* v. *E. L. Aaron & Co., Inc.*, Fed. Sec. L. Rep. (CCH) ¶96,043 at 91,686. The District Court apparently felt that this "strong interest" was enough to constitute a threat of future violations even though Aaron & Co., the firm at which the failure to supervise occurred, was "no longer doing business" and LAM, the company about which the misrepresentations were made by the two registered representatives found to have been under Mr. Aaron's supervision, was in bankruptcy. *Id.* at 91,682.

The District Court, in deciding to grant injunctive relief, considered the nature and extent of the violations, and the "defendant's failure to recognize the wrongful nature of his conduct." *See* Order Granting Injunction in *SEC* v. *E. L. Aaron & Co., Inc.*

The Second Circuit affirmed the issuance of the injunction on a similar basis.

The SIA takes no position whether on remand and on a finding of scienter an injunction should issue against Mr. Aaron. The SIA, however, is concerned that the courts limit the issuance of injunctive relief to cases where the required showing of ongoing or future violations is made.

The federal courts have in the past been inclined to grant injunctive relief largely on the theory that a threat of further violations may be inferred from past conduct. However, some recent cases show an increasing realization that the SEC must come forward with "positive proof" to "demonstrate realistic likehood of recurrence." *SEC* v. *Commonwealth Chemical Securities*, 574 F.2d 90, 100 (2d Cir. 1978); *SEC* v. *Bausch & Lomb*, 565 F.2d 8, 18 (2d Cir. 1977). In a number of recent SEC injunction cases, courts have denied injunctive relief even though violations of the antifraud provisions of the federal securities laws were found, in the absence of a requisite proof of a threat of future wrongdoing. *See, e.g., SEC* v. *Wills*, Fed. Sec. L. Rep. (CCH) ¶96,712 (D.D.C. 1978); *SEC* v. *National Student Marketing*, 430 F. Supp. 639 (D.D.C. 1977); *SEC* v. *Cenco*, 436 F. Supp. 193, 198 (N.D. Ill. 1977).

It is clear that Congress intended to limit the issuance of an injunction to restrain ongoing and threatened violations. Senate Report No. 47, 47th Cong., 1st Sess. 6 (1933), explained that the Government was given the right to seek an injunction so that it could "stop the further or threatened fraud or misrepresentation." Earlier versions of the 1933 Act which did include language permitting resort to injunctions based upon investigative findings of only past misconduct were discarded prior to enactment. *See* Section 13 of H.R. 4314 and S. 875 and Section 20 of H.R. 5480, 73d Cong., 1st Sess. (1933). Furthermore, Congress has repeatedly rejected attempts by the Commission to expand its powers under the Act to be permitted to file for injunctions upon the basis of past misconduct alone, most recently in 1975. *Five Securities Lawyers To Conferees On Proposed Change Of '34 Act.*

§ *21(e)*, 302 Sec. Reg. & L. Rep. (BNA) H-1 (May 14, 1975) and H.R. Rep. No. 229, 94th Cong., 1st Sess. 102 (1975).[10]

The limitation of the SEC injunctive powers to their intended function of protecting the investing public from ongoing or real threats of future violations will not leave the SEC without power to deal with past violations. As noted above, the 1933 and 1934 Acts provide amply for punishment of past violators through criminal penalties, administrative sanctions and civil damages.

The proper standard for the issuance of injunctive relief under the antifraud provisions of the federal securities laws is currently and continually at issue in the federal courts. This Court should use this opportunity to give the lower courts guidance on the proper prerequisites

[10] In 1941, 1956, 1957, and 1959, the Commission unsuccessfully sought to amend the 1933 and 1934 Acts to allow the Commission to obtain an injunction only upon a showing of past illegal conduct. *See Hearings on Proposed Amendments to the Securities Act of 1933 and the Securities Exchange Act of 1934 Before House Committee on Interstate and Foreign Commerce*, 77th Cong., 1st Sess. 875 (1941); Section 227 of H.R. 11129, 84th Cong., 2d Sess. (1966); Section 9 of S. 2544, 85th Cong., 1st Sess. reported in 103 Cong. Rec. 11631 (1957); Section 7 of S. 1178, reported in *Hearings Before Subcomm. of the Senate Comm. on Banking and Currency*, 86th Cong., 1st Sess. 252 (1959). Each of the proposed bills would have added the "has engaged" language, and changed the "proper showing" standard for the issuance of an injunction to a showing "that such person has engaged, is engaged, or is about to engage" in an illegal act.

See S. Rep. No. 1756, 86th Cong., 2d Sess. 4 (1960). In 1975, the Commission sought to add the "has engaged" language to the Acts, and to change "proper showing" to "such a showing." *See* Section 16(b) of S. 249, 94th Cong., 1st Sess. 32 (1975). The proposed changes were deleted in conference. H.R. Rep. No. 229, 94th Cong., 1st Sess. 102 (1975).

for such injunctive relief, particularly since such guidance will be necessary in this case, if, as we urge, a remand is required.

B. The Injunction Issued Here Does Not Comply With the Requirements of Specificity and Reasonable Detail Under Rule 65(d).

The injunction issued in this case is broadly written in the statutory language of Section 17(a) and the regulatory provisions of Rule 10b-5. It provides that:

> "IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendant Peter E. Aaron, his agents, servants, employees, attorneys and those persons in active concert or participation with him, and each of them, be and hereby are permanently enjoined from, directly or indirectly, by the use of any means or instrumentality of transportation or communication in interstate commerce or of the mails, in connection with the offer for sale, sale, offer to purchase, or purchase of the common stock of Lawn-A-Mat Chemical & Equipment Corp., or any other securities:
>
> "(1) employing any device, scheme or artifice to defraud;
>
> "(2) obtaining money or property by means of or otherwise making any untrue statement of a material fact or omitting to state a material fact necessary, in order to make the statements made in light of the circumstances under which they were made, not misleading; or
>
> "(3) engaging in any act, transaction, practice or course of business which operates or would operate as a fraud or deceipt upon any person."

The injunction, in its lack of specificity, is plainly inconsistent with the requirements of Rule 65(d) of the Federal Rules of Civil Procedure which provides in relevant part:

> "Every order granting an injunction ... shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail ... the act or acts sought to be restrained ...."

Mr. Justice Stewart stated in *Schmidt* v. *Lessard*, 414 U.S. 473, 476 (1974):

> "As we have emphasized in the past, the specificity provisions of Rule 65(d) are no mere technical requirements. The Rule was designed to prevent uncertainty and confusion on the part of those faced with injunctive orders, and to avoid the possible founding of a contempt citation on a decree too vague to be understood ... [s]ince an injunctive order prohibits conduct under threat of judicial punishment, basic fairness requires that those enjoined receive explicit notice of precisely what conduct is outlawed."

Earlier this Court stated in *International Longshoresmen Association* v. *Philadelphia Marine Trade Association*, 389 U.S. 64, 76 (1967):

> "The judicial contempt power is a potent weapon. When it is founded upon a decree too vague to be understood, it can be a deadly one.[11]

---

[11] Recently, this Court reiterated the importance of complying with Rule 65(d) in *Pasadena City Board of Education* v. *Spangler*, 427 U.S. 424, 439 (1976):

> "Because of the rightly serious view courts have traditionally taken of violations of injunctive orders, and because of the severity of punishment which may be imposed for such violation, such orders must in compliance with Rule 65 be specific and reasonably detailed."

In *National Labor Relations Board* v. *Express Publishing Co.*, 312 U.S. 426, 432 (1941) this Court struck down an order enjoining respondents in an NLRB proceeding from violating "in any manner the duties imposed on the employer imposed by the statute" based upon a single violation of one particular provision of the statute. The analogy to the decree in this case is clear. Yet this Court stated:

> "[T]he mere fact that the court has found that a defendant has committed an act in violation of a statute does not justify an injunction broadly to obey the statute and then subject the defendant to contempt proceedings if he shall at any time in the future commit some new violations unlike and unrelated to that with which he was originally charged." *Id.* at 435-36.

It may be that some statutory provisions themselves are specific enough so that an injunction stated merely in statutory terms could meet the requirements for specificity. However, Section 17(a) of the 1933 Act and Rule 10b-5 are "catch-all" provisions and, relating as they do to any conduct in connection with the sale, offer or purchase of securities which may be deemed to be fraudulent, clearly lack the required specificity. To expose a defendant to criminal contempt for any conceivable violation of these provisions is plainly inconsistent with the "basic fairness" requirements incorporated in Rule 65(d).

Lower courts have admittedly been prone to issue such broad injunctions at the behest of the SEC. Moreover, in many settlements the SEC has insisted on and obtained such broad relief. Such far-ranging injunctions, however, are, we submit, contrary to the consistent line of decisions of this Court requiring specificity of the conduct to be restrained.

In contrast to the broad injunction in this case, in *SEC* v. *Capital Gains Bureau*, 375 U.S. 180, 193 (1963), the preliminary injunction affirmed by this Court was discretely limited to specific conduct—"requiring a fiduciary to disclose to his clients, not all his security holdings, but only his dealings in recommended securities just before and after the issuance of his recommendations."

A broad injunction such as issued here is not only unfair in that it subjects a defendant to criminal contempt on too vague a command, but its very vagueness greatly reduces its effectiveness as an enforcement tool.

An injunction prohibiting or requiring certain specified conduct gives the defendant a clear direction as to what he should or should not do to prevent future violations of the statute. In contrast, an injunction phrased in the broad statutory or regulatory terms of Section 17(a) and Rule 10b-5 is essentially redundant in that it simply prohibits violation of law. The only effect of such an injunction, if valid, is to add a possible criminal contempt remedy to the substantive criminal penalties already imposed by the 1933 and 1934 Acts. It does not focus the criminal contempt remedy on certain conduct more specific than the general terms of the statute.

Accordingly, on remand this Court should instruct the lower courts to limit any injunction which may be issued to specific conduct reasonably related to the violations of which defendant Aaron may be found to have committed.

CONCLUSION

The Opinion of the Second Circuit should be reversed and remanded for further proceedings for application of the scienter standard with instructions as to the proper prerequisites for, and form of, injunctive relief.

Respectfully submitted,

MILTON V. FREEMAN
WERNER KRONSTEIN
Attorneys for *Amicus Curiae*,
Securities Industry
Association
1229 Nineteenth Street, N.W.
Washington, D.C. 20036

Of Counsel

ARNOLD & PORTER
1229 Nineteenth Street, N.W.
Washington, D.C. 20036
RICHARD O. SCRIBNER
EDMUND P. BERGAN, JR.
20 Broad Street
New York, New York 10005